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Supreme Court, U. S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1972

NO. 72-1172

KENT MILNER, d/b/a BELVEDERE DRIVING SCHOOL, ET AL.,
*Petitioners,*

v.

COLONEL R. H. BURSON
DIRECTOR OF THE GEORGIA DEPARTMENT OF PUBLIC SAFETY, ET AL.,
*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

WESTMORELAND, HALL & BRYAN
3000 First National Bank Tower
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Counsel for Petitioners

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1972

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NO.....

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DIRECTOR OF THE GEORGIA DEPARTMENT OF PUBLIC SAFETY, ET AL.,
*Respondents.*

The Clerk will enter my appearance as counsel for the Petitioners.

John L. Westmoreland, Jr.
Westmoreland, Hall & Bryan
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Atlanta, Georgia 30303

The Clerk is requested to notify counsel of action of the Court by means of:

( ) Collect Telegram

( x ) Airmail Letter

( ) Regular Mail

In this case the person to be notified for Petitioners is:

Edward E. Bates, Jr.
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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

---

The Petitioners pray that a writ of certiorari issue to review the judgment herein of the United States Court of Appeals for the Fifth Circuit entered in the above-entitled case on December 6, 1972, petition for rehearing denied on January 5, 1973.

## CITATION TO OPINIONS BELOW

The opinion of the Three-Judge Panel of the District Court for the Northern District of Georgia denying

Petitioners' prayer for declaratory judgment and injunctive relief is printed in Appendix C hereto and is reported at 320 F. Supp. 706 (D.C.N.D.Ga. 1970). The opinion of the One-Judge District Court for the Northern District of Georgia finding that Petitioners are entitled to an injunction is printed in Appendix B hereto and is reported at 326 F. Supp. 1251 (D.C.N.D. Ga. 1971). The opinion of the Court of Appeals for the Fifth Circuit, which vacated and remanded the judgment of the One-Judge District Court for the Northern District of Georgia, is printed in Appendix A hereto and has not yet been reported. The judgment and order of the Court of Appeals for the Fifth Circuit denying rehearing is printed in Appendix E.

## JURISDICTION

The judgment of the Court of Appeals, printed in Appendix A hereto, was entered on December 6, 1972, and the petition for rehearing denied on January 5, 1973. The Court of Appeals recalled and stayed its mandate to and including March 1, 1973.

The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

## QUESTIONS PRESENTED

(1) Did the Court below err in holding that the District Court's injunction encompassed "pending" as well as future state prosecutions, thus raising the problems considered by the Supreme Court in *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971) and by the Fifth Circuit Court of Appeals in *Becker v. Thompson*, 459 F. 2d 919 (5th Cir. 1972).

(2) Did the Court below err in holding that even where the action for declaratory relief was brought in the District Court several months prior to the institution of state criminal proceedings against the Petitioners, the District Court should not have considered issuance of an injunction in aid of its jurisdiction under 28 U.S.C., Section 2283, without having first applied the *Younger* restrictions regarding *interference* in the state criminal prosecutions?

## CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The following constitutional provision and statutes, being lengthy, are set forth in Appendix D hereto.

(1) The constitutional provision involved is the "due process" and "equal protection" clause of the Fourteenth Amendment to the United States Constitution.

(2) The statutes under which Petitioners were threatened with prosecution are Ga. L. 1968, pp. 436-441, Ga. Code Ann. Chpt. 92A-11 (Supp. '70), and its related criminal statute, Ga. Code Ann., Section 92A-9926.

(3) The statute under which federal jurisdiction was invoked is 28 U.S.C., Section 1331.

(4) The statutes under which the Three-Judge Panel was convened are 28 U.S.C., Section 2281 and 28 U.S.C., Section 2284.

(5) The statute under which the One-Judge District Court declared the state statute unconstitutional as applied is 28 U.S.C., Section 2201.

(6) The statute under which the One-Judge District

Court granted the injunction against state criminal prosecution of the Petitioners is 28 U.S.C., Section 2283.

## STATEMENT OF THE CASE

In 1968 the Georgia General Assembly enacted the Driver Training School Act, hereinafter referred to as the "Act," which was approved by the Governor on March 27, 1968. Ga. L. 1968, pp. 436-441; Ga. Code Ann., Chpt. 92A-11 (Supp. 1970). Section Two of the Act provides:

> "No person shall operate a driver training school or engage in the business of giving instruction for hire in the driving of motor vehicles . . . unless a license therefore has been received from the department." 92A-1102 (Acts 1968, pp. 436, 437).

Section Four provides:

> "Every person in order to qualify as instructor for a driving school shall meet the following requirements . . . (b) Must present to the department evidence of credit in driver education and safety from an accredited college or university equivalent to credits in those subjects which are required of instructors in the public schools of Georgia." 92A-1104 (Acts 1968, pp. 436, 438).

Section Ten of the Act provides:

> "This Chapter shall not apply to an accredited elementary school, secondary school, junior college or college conducting a driver training course, nor shall it apply to driver improvement schools operated by this State, a county or municipality thereof." 92A-1109 (Acts 1968, pp. 436, 441).

The penal sanctions are found in Section 92A-9926:

> "Any person violating any provision of Chapter 92A-11, which regulates driver training schools,

shall be guilty of a misdemeanor, and upon conviction thereof shall be punished as for a misdemeanor. (Acts 1968, pp. 436, 441).

Petitioners are commercial driving schools and their instructors in the State of Georgia. Respondents are public officials charged with enforcing the Act. Named were Col. R. H. Burson, Director of Georgia Department of Public Safety, Mr. Hinson McAuliffe, Solicitor of the Criminal Court of Fulton County, Herbert T. Jenkins, Chief of Police, City of Atlanta, Georgia, and Mr. J. B. Angelo Crowe, a consultant in driver training employed by the State Board of Education.

On August 25, 1970, Petitioners filed suit in the United States District Court, Northern District of Georgia challenging the constitutionality of the Act. The complaint asked that the Act be declared unconstitutional because it violated the "due process" and "equal protection" clause of the Fourteenth Amendment to the United States Constitution, and prayed for a temporary and permanent injunction enjoining and restraining the Respondents from enforcement of the educational requirements of the Act.

On September 29, 1970, Petitioners filed an amendment to the complaint alleging that the educational requirements of 92A-1104(b) were not being applied equally to commercial driving instructors and to instructors in the public schools.

The complaint was originally brought as a class action on behalf of all persons similarly situated to named Petitioners and proper notice was given pursuant to Rule 23(c)(2), F.R.C.P. on October 8, 1970. Requests for exclusion by certain members of the class were filed on October 15, 1970.

At the Three-Judge hearing held on October 19, 1970, Respondents argued that the Act merely required of commercial driving instructors what the public school teachers were already required to do and were in fact doing. The order and judgment of the Three-Judge District Court entered on December 30, 1970 (App. C, p6C) held that the Act was constitutional on its face, but the holding specifically provided that it was without prejudice to plaintiff's right to contest an unconstitutional application of the Act by State officers. (App. C, p6C).

On January 21, 1971, the Petitioners filed a notice of appeal from the order and judgment of the Three-Judge Court to the Supreme Court of the United States pursuant to 28 U.S.C., Section 1253. On March 23, 1971, the Petitioners moved that the appeal be withdrawn pursuant to Rule 14(1) of the Supreme Court of the United States, and also moved for a temporary injunction. The order entered on March 23, 1971 provided that the appeal was allowed to be withdrawn and set a hearing on the temporary injunction for March 31, 1971. The record was never docketed in the Supreme Court and was returned unopened from the United States Supreme Court on March 26, 1971.

At the hearing on March 31, 1971, before the Single-Judge District Court, Respondents moved the Court to dismiss proceedings on unconstitutional application of the Act on the ground that the appeal to the Supreme Court of the United States was improperly dismissed. After a full hearing on the question, the District Court denied the motion and the appeal was again ordered dismissed.

At the hearing on March 31, 1971 the Single-Judge

Court found, based on the evidence introduced, that the Act was not being administered with an even hand. (App. B, p.4B). Numerous driving instructors from public schools and colleges testified that they were teaching driver training, although none had completed the required three courses. The State Patrol Officers testified that the agency had no intention of enforcing the Act against public school instructors. On the other hand, the Petitioners testified that they had applied for licenses and been refused because of not meeting the educational requirements and that several days before the March 31 hearing four Petitioners had also been issued citations for violation of the Act.

On April 15, 1971, the District Court entered an order holding that the Petitioners were entitled to injunctive relief as prayed (App. B, p. 6B) and directed counsel for Petitioners to prepare and submit to the Court an order to this effect. Thereafter, the Court entered an order and judgment enjoining the Respondents from the further enforcement of the educational requirements of the Act until it could be shown that the Act would be enforced in a non-discriminatory manner. The Court pointed out that at the Three-Judge hearing, the Respondents assured the Court that under the Act all driving instructors were to be treated the same. However, under the evidence presented at the Single-Judge hearing, it was proved and Respondents admitted that the Act was being applied in a manner that exempted driving instructors employed by the public school system. (App. B, p. 4B).

In its decision the District Court considered *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed. 2d 669 (1971), deciding that, since the federal action for

declaratory and injunctive relief had been pending for several months prior to the issuance of citations by the state, injunctive relief in aid of the Court's jurisdiction would not be in conflict with *Younger*. (App. B, p.5B n. 2).

Respondents filed a notice of appeal from the District Court order on August 13, 1971.

On appeal, the Court of Appeals for the Fifth Circuit vacated the judgment of the District Court and remanded the case for reconsideration in light of the United States Supreme Court's decision in *Younger v. Harris* and by the Fifth Circuit in *Becker v. Thompson*, 459 F.2d 919 (5th Cir., 1972) (See Appendix A). Although *Younger* had been considered by the District Court, the Court of Appeals found the District Court had misinterpreted *Younger*, because the District Court had found its action not in conflict with *Younger* for the reason that there was no state prosecution pending when the District Court's jurisdiction attached. Under the rationale of *Becker v. Thompson*, the Court of Appeals refused to recognize a distinction between Federal Court intervention where state criminal prosecution is imminent or threatened and intervention where state criminal prosecution is already pending. Thus, the case was remanded and the District Court instructed to apply *Younger* standards equally to threatened as well as pending state criminal prosecutions.

Following the December 6, 1972 opinion and judgment of the Court of Appeals (Appendix A), petitioners requested a rehearing which was denied on January 5, 1973.

The mandate of the Court of Appeals issued on

January 15, 1973, but pursuant to the motion of Petitioners, was recalled and stayed to and including March 1, 1973, pending application for a writ of certiorari to the Supreme Court of the United States.

## REASONS FOR GRANTING THE WRIT

The decision of the court below, based upon the much-debated rationale of its decision in *Becker v. Thompson*, 459 F.2d 919 (5th Cir., 1972), *rehearing and rehearing en banc denied*, 463 F.2d 1338 (5th Cir., 1972), holds that a federal declaratory judgment action challenging the constitutionality of a state criminal law is subject to the restrictions imposed by *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed. 2d 669 (1971) and companion cases, regardless of whether prosecutions under that law have been initiated. This position has heretofore been rejected by the First Circuit, viz., *Wulp v. Corcoran*, 454 F.2d 826 (1st Cir., 1972), the Third Circuit, viz., *Lewis v. Kugler*, 446 F.2d 1343 (3rd Cir., 1971), the Sixth Circuit, viz., *Crossen v. Breckenridge*, 446 F.2d 833 (6th Cir., 1971), and rejected or ignored by at least four District Courts, viz., *Anderson v. Vaughn*, 372 F. Supp. 101 (D. Conn. 1971); *Thoms v. Smith*, 334 F. Supp. 1203 (D. Conn. 1971); *Maldonado v. County of Monterey*, 330 F. Supp. 1282 (N.D. Cal. 1971); *Mitchell Family Planning, Inc. v. City of Royal Oak*, 335 F. Supp. 738 (E.D. Mich. 1972).

In addition, the validity of the Fifth Circuit's position that *Younger* restrictions apply equally to threatened as well as pending state criminal prosecution becomes even more suspect in view of the Supreme Court's pronouncement that the reasoning supporting the application of the *Younger* doctrine has "little force in the

absence of a pending state proceeding. In that circumstance exercise of federal court jurisdiction ordinarily is appropriate if the conditions for declaratory or injunctive relief are met." *Lake Carriers' Assn. v. MacMullan*, 406 U.S. 498, 92 S.Ct. 1794 at 1757, 32 L.Ed.2d 257 (1972).

The Fifth Circuit has agreed with other Circuits that the Supreme Court in *Younger* reserved the question of whether the same standards governing abstention would apply in cases in which there is no pending state prosecution. See *Becker v. Thompson, supra*, 459 F.2d at 922; *Wulp v. Corcoran, supra*, 454 F.2d at 830; *Lewis v. Kugler, supra*, 446 F.2d at 1347. However, in direct conflict with the other Circuits, the Fifth Circuit has chosen to apply the same rigorous standard of irreparable injury as defined in *Younger* to a case where no state prosecution is pending. *Becker v. Thompson, supra*, 459 F.2d at 922; *Kent Milner d/b/a Belvedere Driving School v. Colonel R. H. Burson*, ___ F.2d ___ (5th Cir., 1972).

The other Circuit and District Courts which have considered the question have found that to apply *Younger* restrictions to cases where no state action is pending is to in effect concede that there is no room left for the use of the Federal Declaratory Judgment Act, 28 U.S.C., Section 2201, in testing state and federal criminal statutes. See e.g., *Wulp v. Corcoran*, 454 F.2d 826, 832 (1st Cir., 1972); *Lewis v. Kugler*, 446 F.2d 1343, 1347-1348 (3rd Cir., 1971); *Anderson v. Vaughn*, 327 F. Supp. 101, 102 (D. Conn. 1971).

Petitioners agree that judicially imposed limitations on declaratory and injunctive relief are appropriate when a state prosecution is already underway, because

a federal declaratory judgment action would almost invariably disrupt that proceeding, which may by itself provide the defendant with an adequate procedural vehicle for testing the law's constitutionality. *Samuels v. Mackell*, 401 U.S. 66, 91 S.Ct. 764, 27 L.Ed. 2d 688 (1971). But such considerations are absent when the federal plaintiff has not yet been arrested or charged and therefore, apart from a declaratory judgment action, has no choice but to obey the potentially unconstitutional application of the statute or to disobey it and risk fine or imprisonment on the ultimate outcome.

Although the court below makes the statement that the District Court injunction encompassed "*pending* as well as future prosecutions," (emphasis added) surely the Court is not implying that the criminal citations issued to several Petitioners months after federal jurisdiction had attached and after the Three-Judge hearing but just before the final One-Judge hearing, became "pending" proceedings under the anti-injunction statute or *Younger*. The Supreme Court made it clear in *Younger* that in referring to "pending" state prosecutions, it had reference only to state proceedings initiated prior to the filing of the federal action. *Younger v. Harris, supra*, 401 U.S. at 41, 91 S.Ct. at 749, 27 L.Ed. 2d at 674):

> "We express no view about the circumstances under which federal courts may act when there is no prosecution pending in state courts *at the time the federal proceeding is begun.*" (emphasis added).

While in *Younger* it was not necessary for the Court to decide the propriety of federal relief when a state prosecution was initiated after the federal suit was filed but was pending at the time of the federal hearing, the

Court has held that state prosecutions are not pending within the intendment of the federal anti-injunction act, 28 U.S.C.A., Section 2283, when initiated subsequent to the federal action. *Dombrowski v. Pfister*, 380 U.S. 479, 484 n.2, 85 S.Ct. 1116 (1965). See *Ex Parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908).

To allow the state to so alter the nature of federal proceedings, especially after hearings have been held and jurisdiction retained for further hearings, would be to distort beyond recognition the clear import of *Younger, Dombrowski* and related cases, and would, in effect, allow the state to usurp the jurisdiction of the federal courts.

## CONCLUSION

The judgment below is in direct conflict with the decisions of several other Courts of Appeal and District Courts on the same matter. As such, it represents a unique and unwarranted extention of the Supreme Court's decisions in *Younger v. Harris*, and related cases. Because of the conflict among the Circuits, created by the Fifth Circuit's position in the decision below, this petition for a writ of certiorari should be granted.

Respectfully submitted,

WESTMORELAND, HALL & BRYAN

BY: _____

BY: _____

BY: _____

BY: _____

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(404) 658-1935

## PROOF OF SERVICE

I, JOHN L. WESTMORELAND, JR., one of the attorneys for Kent Milner d/b/a Belvedere Driving School, et al., petitioners herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the .. day of February, 1973, I served copies of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit on the several parties thereto, as follows:

(1) On Col. R. H. Burson, Director of Georgia Department of Public Safety, by mailing three copies in a duly addressed envelope, with first class postage prepaid to his attorney of record, Dorothy T. Beasley, 132 State Judicial Building, 40 Capitol Square, N. W., Atlanta, Georgia 30334.

(2) On Hinson McAuliffe, Solicitor of the Criminal Court of Fulton County, by mailing three copies in a duly addressed envelope, with first class postage prepaid to Hinson McAuliffe, 53 Civil-Criminal Courthouse, 160 Broad Street, S. W., Atlanta, Georgia 30303.

(3) On Herbert T. Jenkins, Chief of Police, City of Atlanta, Georgia, by mailing three copies in a duly addressed envelope, with first class postage prepaid to his attorney of record, Henry L. Bowden, 2614 First National Bank Building, Atlanta, Georgia 30303.

(4) On J. B. Angelo Crowe, Driver Training Consultant, State Board of Education, by mailing three copies in a duly addressed envelope, with first class postage prepaid to his attorney of record, Dorothy T. Beasley, 132 State Judicial Building, 40 Capitol Square, N. W., Atlanta, Georgia 30334.

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